No. 11,584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MITSUKIYO YOSHIMURA,
Appellant,

vs.

JAMES M. ALSUP, the United States Collector of Internal Revenue for the District of Hawaii,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

Pursuant to Section 24 of the Judicial Code as amended, USCA Title 28, Section 41, Paragraphs 1 and 5, and to Rules 2 and 65 of the Federal Rules of Civil Procedure, the Appellant, Mitsukiyo Yoshimura, brought a suit, in the United States District Court for the District of Hawaii, against Fred H. Kanne, the United States Collector of Internal Revenue for the District of Hawaii, the Appellee, to permanently enjoin the latter from collecting from the Appellant the additional federal income taxes assessed against the Appellant for the years 1941, 1942 and 1943 in the

total sum of six thousand three hundred twenty-five dollars ($6,325.00), plus the 50% penalty thereon for said years in the total sum of three thousand one hundred sixty-two dollars fifty-one cents ($3,162.51).

The Appellant duly filed his complaint in said United States District Court. (Tr. 4-13.)

The Appellee duly filed a motion to dismiss (Tr. 14-15), together with a memorandum of points and authorities (Tr. 16-18), which motion was denied. (Tr. 36.) Thereupon, the Appellee duly filed an answer. (Tr. 18-32.)

Following a hearing on said complaint and in pursuance of an oral ruling, an order sustaining motion to dismiss (Tr. 36-40) was duly filed and a judgment duly entered thereon. (Tr. 32-33.)

Appellee duly filed his notice of appeal. (Tr. 33, 34.)

Upon the death of said Fred H. Kanne, Henry Robinson, the Acting United States Collector of Internal Revenue for the District of Hawaii, was duly substituted as the Appellee in said cause (Tr. 157-160) and an order enjoining collection of taxes during pendency of appeal entered. (Tr. 162.) Subsequently, James M. Alsup, the United States Collector of Internal Revenue for the District of Hawaii, was duly substituted as the said Appellee and as the party restrained in said order enjoining collection of taxes during pendency of appeal.

Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was taken and perfected pursuant to Section 225, 28 USCA.

STATEMENT OF THE CASE.

At the hearing of the complaint of the Appellant in the United States District Court of Hawaii, the Appellee renewed his motion to dismiss (Tr. 53) which was denied. (Tr. 56.) Then the Appellee moved for judgment on the pleadings (Tr. 56) which was also denied. (Tr. 61.)

Thereupon, at said hearing, the Appellant introduced evidence to the following effect:

The Appellant was a subject of Japan with limited education in the English language (Tr. 71-72) who operated a service station at Waiau, Oahu, Territory of Hawaii (Tr. 73), which was less than a quarter of a mile from Pearl Harbor, Oahu, Territory of Hawaii. (Tr. 143.)

Sometime during 1944, three men from the United States Bureau of Internal Revenue came to his place of business at said Waiau to investigate. (Tr. 82-83.) In the course of said investigation, one of said men discovered a mis-entry in the Appellant's book in the sum of one hundred fifty dollars ($150.00) (Tr. 87) and told the Appellant that he could be interned for such a mistake, and, thereafter, constantly reminded the Appellant during said investigation of such possibility. (Tr. 88.)

At the request of one of said men, Mr. Irey, Appellant went to said Mr. Irey's office where the Appellant was asked to and did sign a statement to the effect that he had defrauded the United States Government in taxes. The Appellant was permitted to sign said statement although the Appellant failed to understand

the nature and significance of said statement. (Tr. 91, 92.)

Subsequently, three other men from the United States Bureau of Internal Revenue came to the Appellant's place of business at said Waiau and advised him to retain a lawyer. (Tr. 93, 94.) Following said advice, the Appellant secured the services of Mr. Kashiwa, an attorney-at-law (Tr. 94) who also could practice before the United States Treasury Department. (Tr. 153.)

Finally, two men from the United States Bureau of Internal Revenue came to the Appellant's place of business at said Waiau to have the Appellant sign Forms 870, a copy of which was introduced in evidence. (Plaintiff's Exhibit F, Tr. 173-175.) The Appellant inquired of said men what said forms were for, and told them that he didn't understand the nature and significance of said forms, and that he wished to see his lawyer, Mr. Kashiwa, before signing said forms. The Appellant was told by said men that said forms concerned his taxes and that unless he signed said forms immediately he would thereby incur the wrath of the boss and thereby possibly suffer a jail term or a huge fine. Whereupon, the Appellant signed said forms. (Tr. 132-133.) Said Forms 870 which the Appellant signed were in blank forms, there being no figures whatsoever entered on said forms. (Tr. 95.)

The following day, the Appellant saw Mr. Kashiwa, his lawyer, and told him about the signing of said Forms 870. Immediately thereupon, said Mr. Kashiwa went to see Mr. Glutsch of the United States Bureau

of Internal Revenue who informed said Mr. Kashiwa that said Forms 870 had already been mailed to Washington, D. C. (Tr. 148, 149.) Said Mr. Kashiwa then wrote to the Commissioner of Internal Revenue in Washington, D. C., but to no avail. (Tr. 150-152.)

As the consequence of said signing of said Forms 870, the Appellant was assessed the total sum of six thousand three hundred twenty-five dollars ($6,325.00) as additional federal income taxes for the years 1941, 1942 and 1943, plus three thousand one hundred sixty-two dollars and fifty-one cents ($3,162.51) as penalties therefor.

The Appellant was and is in no position whatsoever to pay said taxes and penalties. (Plaintiff's Exhibit D, Tr. 145, 146.)

Upon the close of the Appellant's case, the Appellee renewed his motion to dismiss. (Tr. 171.) The motion was granted on the ground that Section 3653(a), 26 USCA, prohibited the United States District Court for the District of Hawaii from entertaining the suit brought by the Appellant. In ruling as aforesaid, it was held that the judicial exception to the application of said Section 3653 (a) required not only the showing of extraordinary and exceptional circumstances but also required the showing of the illegality of the tax and that the Appellant had failed to show such illegality of the tax. (Tr. 177-178.) An exception was duly taken by the Appellant to the said granting of said motion. (Tr. 183.)

Immediately upon the granting of said motion, the Appellant moved to re-open his case to introduce evi-

dence to show that he did not owe the United States Government any additional income taxes for the years 1941, 1942 and 1943, but it was denied on the ground that it involved the computation of taxes which was of no concern of said Court. An exception was duly taken by the Appellant to said denial. (Tr. 178, 179.)

SPECIFICATIONS OF ERROR.

1. That the trial judge of the United States District Court for the District of Hawaii erred in granting to the Appellee the motion to dismiss on the ground that Section 3653 (a), 26 USCA, prohibited said United States District Court from entertaining the suit brought by the Appellant.

2. That the trial judge of the United States District Court for the District of Hawaii erred in denying the Appellant's request to re-open the case to introduce evidence to show that the Appellant did not owe the United States Government any additional federal income taxes for the years 1941, 1942 and 1943 on the ground that since it involved the computation of taxes it was of no concern of said United States District Court.

SUMMARY OF ARGUMENT.

1. That the judicial exception to the application of Section 3653 (a), 26 USCA, does not require the showing of the illegality of the tax.

2. That, assuming that the judicial exception to the application of Section 3653 (a), 26 USCA, does require the showing of the illegality of the tax, the Appellant did, by sufficient and competent evidence, show such illegality of the tax.

3. That, assuming that the judicial exception to the application of Section 3653 (a), 26 USCA, does require the showing of the illegality of the tax, the Appellant was erroneously prevented by the trial judge of the United States District Court for the District of Hawaii from showing such illegality of the tax.

4. That the Appellant, by sufficient and competent evidence, showed the extraordinary and exceptional circumstances required by the judicial exception to the application of Section 3653 (a), 26 USCA.

ARGUMENT.

1. THAT THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA, DOES NOT REQUIRE THE SHOWING OF THE ILLEGALITY OF THE TAX.

It is well settled that Section 3653(a), 26 USCA, which reads as follows:

> "Section 3653. Prohibition of Suits to Restrain Assessment or Collection.
>
> "(a) Tax. Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

does not absolutely prohibit a federal court from entertaining a suit to restrain the assessment or collection of a federal tax. An exception to the application of said Section 3653 (a) was created by judicial decision. *Allen v. Regents of the University System of Georgia* (1938), 82 L. Ed. 1448, 58 S. Ct. 980, 304 U. S. 439; *Miller v. Standard Nut Margarine Co. of Florida* (1932), 76 L. Ed. 422, 52 S. Ct. 260, 284 U. S. 498; *Hill, Jr., et al. v. Wallace, et al.* (1922), 66 L. Ed. 822, 42 S. Ct. 453, 259 U. S. 44.

It is submitted that the said judicial exception to the application of the said Section 3653 (a) merely requires the showing of extraordinary and exceptional circumstances and does not require the showing of the illegality of the tax.

In *Snyder v. Marks* (1883), 27 L. Ed. 901, 902, 903, 3 S. Ct. 157, 109 U. S. 189, the United States Supreme Court held as follows:

> "In the Revised Statutes this amendment of and addition to Section 19 of the Act of 1866 is made a section by itself (Section 3224), separated from that of which it is an amendment and to which it is an addition, and reads thus: 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' The word 'any' was inserted by the reviser. This enactment in section 3224 has a no more restricted meaning that it had when, after the Act of 1867, it formed a part of section 19 of the Act of 1866, by being added thereto. The first part of section 19 related to a suit to recover back money paid for a tax alleged to have been errone-

ously or illegally assessed or collected, and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended, to say that 'No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.' The addition of 1867 was in pari materia with the previous part of the section and related to the same subject matter. The tax spoken of in the first part of the section was called a tax sub modo, but was characterized as a 'tax alleged to have been erroneously or illegally assessed or collected.' *Hence, when, in the addition to the section, a tax was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in section 3224. There is, therefore, no force in the suggestion that section 3224, in speaking of a tax means only a legal tax, and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.*" (Italics ours, and Revised Statutes, Section 3224, is substantially Section 3653 (a), 26 USCA.)

In view of the said *Snyder* case, it is rather significant that the United States Supreme Court merely held that the said Section 3653 (a) did not apply in extraordinary and exceptional circumstances.

> "This court has given effect to Section 3224 in a number of cases. * * * It has never held the rule to be absolute, but has separately indicated that extraordinary and exceptional circumstances

render its provisions inapplicable." *Miller v. Standard Nut Margarine Co. of Florida* (1932), 76 L. Ed. 422, 430, supra.

"It has been held by this court, in *Dodge v. Brady,* 240 U. S. 122, 126, 60 L. Ed. 560, 562, 36 S. Ct. Rep. 277, that Section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable." *Hill, Jr., et al. v. Wallace, et al.* (1922), 66 L. Ed. 822, 827, supra.

In view of the foregoing cases, it is submitted that the United States Supreme Court did not intend that the judicial exception to the application of the said Section 3653 (a) shall require the showing of the illegality of the tax.

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2. THAT, ASSUMING THAT THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA, DOES REQUIRE THE SHOWING OF THE ILLEGALITY OF THE TAX, THE APPELLANT DID, BY SUFFICIENT AND COMPETENT EVIDENCE, SHOW SUCH ILLEGALITY OF THE TAX.

Assuming that the judicial exception to the application of Section 3653 (a), 26 USCA, requires the showing of the illegality of the tax, it is submitted that the Appellant, by sufficient and competent evidence, did show such illegality of the tax.

The Appellant testified to the effect that on a day certain, two men from the United States Bureau of

Internal Revenue came to his place of business at Waiau, Oahu, Territory of Hawaii (Tr. 94), with Forms 870, a copy of which was introduced in evidence. (Plaintiff's Exhibit F, Tr. 173-175.) Said men wanted the Appellant to sign said forms immediately. (Tr. 94, 95.) The Appellant failing to understand the nature and significance of said forms (Tr. 95) told said men that he didn't understand the nature and significance of said forms, that he wanted to see Mr. Kashiwa, his lawyer, before signing any of said forms. (Tr. 132.) Said Mr. Kashiwa, an attorney at law, who also could practice before the United States Treasury Department (Tr. 153), had been retained by the Appellant upon the advice of some men from the United States Bureau of Internal Revenue. (Tr. 93, 94.) Said men with said forms merely stated to the Appellant that said forms concerned his tax cases (Tr. 132), then told the Appellant that unless he signed said forms then and there he would incur the wrath of the higher up, thereby possibly becoming liable to a jail term or a huge fine. (Tr. 94, 95.) Under said circumstances, the Appellant finally signed said Forms 870. Said Forms 870 signed by the Appellant had no figures whatsoever thereon. They were in blank forms. (Tr. 95.)

As the consequence of signing said Forms 870, the Appellant was assessed for the years 1941, 1942 and 1943, additional federal income taxes and penalties thereon, in the total sum of nine thousand four hundred eighty-seven and fifty-one cents ($9,487.51). (Tr. 95, 96.)

It is submitted that the said conduct of the said men was arbitrary and capricious. In fact, the trial judge intimated so much. (Tr. 178.)

It is submitted that the said taxes assessed in consequence of said arbitrary and capricious conduct of said men were illegal, and that the showing thereof was a showing of the illegality of the tax as required by the judicial exception to the application of the said Section 3653 (a).

> "These enactments forbid in sweeping language the issuance of an injunction to restrain the collection of a tax which is assessed under color of office and *without arbitrary or capricious conduct.*" (Italics ours, and Court here was speaking about Section 3224.) *Burke v. Mingori et al.* (CCA, 10th Circuit, 1942), 128 F. (2d) 996, 997.

> "The Commissioner is therein empowered to determine the taxable status of persons handling denatured alcohol. His right to do so may not be restrained by a suit to enjoin the collection of the tax so assessed, *provided that he does not act arbitrarily or capriciously.*" (Italics ours, and speaking about Section 3224.) *Jacoby et al. v. Hoey* (CCA, 2nd Circuit, 1936), 86 F. (2d) 108, 109, certiorari denied, 57 S. Ct. 315, 299 U. S. 613, 81 L. Ed. 452.

3. THAT, ASSUMING THAT THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA, DOES REQUIRE THE SHOWING OF THE ILLEGALITY OF THE TAX, THE APPELLANT WAS ERRONEOUSLY PREVENTED BY THE TRIAL JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII FROM SHOWING SUCH ILLEGALITY OF THE TAX.

After the Appellant had rested his case, the Appellant moved to reopen his case to introduce evidence to show that for the years 1941, 1942 and 1943, the Appellant owed the United States Government no additional federal income taxes. (Tr. 178.) The trial judge of the United States District Court for the District of Hawaii denied it on the ground that it involved the computation of the tax which was of no concern of said United States District Court. (Tr. 178.)

It is submitted that the showing that the Appellant, for the years 1941, 1942 and 1943, owed the United States Government no additional federal income taxes, is a showing of the illegality of the taxes assessed against the Appellant as additional federal income taxes for said years, and that that is a showing of the illegality of the tax as required by the judicial exception to the application of said Section 3653 (a).

> "We think Section 3653, I. R. C. applies except in a case wherein it is shown, in addition to the fundamental allegations necessary to obtain injunctive relief, *that under no possibility could the attempted exaction be held legal* * * * or in the unusual and extraordinary circumstances such as confronted the court in *Graham v. Dupont,* 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965, and in

Allen v. Regents, 304 U. S. 439, 445, 58 S. Ct. 980, 82 L. Ed. 1448." (Italics ours.) *Matcovich v. Nickell* (CCA, 9th Circuit, 1943), 134 F. (2d) 837, 838.

"When it is made to appear that the rights and property of an alleged taxpayer will be utterly destroyed if he is compelled to pay a *tax that is not in fact his obligation* and the pursuit of his remedy by suit for the recovery will not adequately restore to him that which he has lost, a court of equity may take jurisdiction to grant relief in advance of payment notwithstanding the prohibition in Section 3653." (Italics ours.) *Midwest Haulers, Inc., et al. v. Brady* (CCA, 6th Circuit, 1942), 128 F. (2d) 496, 499.

It is submitted that even if it involved the computation of the taxes, the trial judge of said United States District Court should have permitted the Appellant to introduce evidence to show that for the years 1941, 1942 and 1943, the Appellant owed the United States Government no additional federal income taxes, thereby showing the illegality of the additional federal income taxes assessed against the Appellant for said years, and thereby showing the illegality of the tax as required by the judicial exception to the application of said Section 3653 (a).

4. THAT THE APPELLANT, BY SUFFICIENT AND COMPETENT EVIDENCE, SHOWED THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES REQUIRED BY THE JUDICIAL EXCEPTION TO THE APPLICATION OF SECTION 3653 (a), 26 USCA.

It is submitted that the Appellant, by sufficient and competent evidence showed the extraordinary and exceptional circumstances as required by the judicial exception to the application of Section 3653 (a), 26 USCA.

In *Allen v. Regents of the University System of Georgia* (1938), 82 L. Ed. 1448, 1456, supra, the United States Supreme Court said:

> "What we have said indicates that Rev. Stat. Section 3224, supra, does not oust the jurisdiction. The statute is inapplicable in *exceptional cases where there is no plain, adequate, and complete remedy at law.*" (Italics ours.)

Furthermore, it was held in *Kingan & Co., Inc. v. Smith* (1936), 16 F. Supp. 549, that:

> "A remedy at law, in order that it may be adequate, must be plain, complete and beyond doubt. As was said by the Supreme Court, in the case of *Davis v. Wakelee,* 156 U. S. 680, 15 S. Ct. 555, 558, 39 L. Ed. 578: 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' "

The Appellant testified as to signing Forms 870 which were in blank forms, and as the consequence thereof to being assessed the total sum of nine thousand four hundred eighty-seven dollars and fifty-one cents ($9,487.51) as additional federal income taxes and penalties thereon for said years. (See Argument 2.)

It was shown that the Appellant was and is in no position whatsoever to pay said total sum. (Plaintiff's Exhibit D, Tr. 145, 146.)

It is submitted, that under the circumstances, the Appellant's remedy at law, if any, was at best doubtful and uncertain.

CONCLUSION.

In conclusion, the Appellant contends that, in view of the foregoing argument, the trial judge of the United States District Court for the District of Hawaii erred, to the prejudice of the Appellant, in granting the motion to dismiss to the Appellee on the ground that Section 3653 (a), 26 USCA, prohibited the maintenance of Appellant's suit in the said United States District Court, and that the said trial judge erred, to the prejudice of the Appellant, in denying the Appellant's request to reopen his case to introduce evidence to show that the Appellant owed the United States Government no additional federal income taxes for the years 1941, 1942 and 1943.

Therefore, it is respectfully submitted that the judgment of the said trial judge should be reversed.

Dated, Honolulu, T. H.,
October 24, 1947.

MITSUKIYO YOSHIMURA,
Appellant,
By SHIRO KASHIWA,
His Attorney.